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Recent Decision

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shall be cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the error or errors found in the record upon which the judgment of reversal is grounded. (2) An appeal on questions of law and fact shall entitle the party to a hearing and determination of the facts *de novo* and shall be upon the same or amended pleadings." [12]

In summation, the mechanics may be stated briefly as follows: Within three days after judgment is rendered in the Court of Common Pleas, a motion for new trial is made, and if overruled, an entry for final order is signed by the presiding judge; the appealing counsel must then file a Notice of Appeal within twenty (20) days next following, to the clerk of the court from which the appeal is taken, such Notice of Appeal containing a designation of the judgment or order appealed from, and whether the appeal is on questions of law, or law and fact. Post a supersedeas bond when the appeal is on questions of law and fact in the amount directed by the court from which the appeal is taken, such bond to be filed with the clerk of said court. File a praecipe and pay the required fee to such clerk for the preparing and filing of the transcript of the case with all necessary dockets, journal entries, papers, etc. Prepare a record of the testimony of the case with the assistance of a public stenographer if necessary, and list all errors for review; file Bill of Exceptions submitted with brief within ten days after notice of appeal, and prepare for hearing in the Court of Appeals.

Samuel L. Devine.

RECENT DECISION

INCOME TAX—CONSTITUTIONAL IMMUNITY OF EMPLOYEE FROM FEDERAL STATE TAXATION.—Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of $2400. In his income tax return for that year he included his salary as subject to the New York state income tax. The law exempted from the tax "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States." Petitioners, New York State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was con-

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12 Central National Bank of Cleveland v. Newton, (Ohio App. 1939) 22 N. E. (2d) 428; Jarboe v. Workingmen's Overall Supply Co., (Ohio App. 1939) 22 N. E. (2d) 416. See also, Union Trust Co. v. Lessovitz, 122 Ohio St. 406, 171 N. E. 849 (1937).

stitutionally exempt from state taxation because the Home Owners' Loan Corporation is an instrumentality of the United States government and that he, during the taxable year, was an employee of the Federal government engaged in the performance of a governmental function. On review by certiorari the Tax Board's action was set aside by the Appellate Division of the Supreme Court of New York, whose order was affirmed by the Court of Appeals. The United States Supreme Court in March of 1939 by a momentous and far-reaching decision reversed the action of the New York courts. *Mark Graves et al v. State of New York ex rel O'Keefe,* 83 L. ed. 577 (1939).

And thus on the 27th day of March, 1939, by one sweeping stroke of judicial interpretation the United States Supreme Court achieved a goal long sought after by American economists and socially conscious jurists; a goal only attained by wholesale overruling of numerous United States decisions bulwarked by the legal cogency of successive United States Supreme Courts.

In the majority opinion written by Mr. Justice Stone, the United States Supreme Court expressly overrules by the principal case decisions rendered in *Collector v. Day,* 11 Wall. 113, 20 L. ed. 122 (1871); *New York ex rel Rogers v. Graves,* 299 U. S. 401, 81 L. ed. 306, 57 S. Ct. 299 (1936); and impliedly overrules, so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities *Dobbins v. Erie County,* 16 Pet. 435, 10 L. ed. 1022 (1842); *Brush v. Commissioners of Internal Revenue,* 300 U. S. 352, 81 L. ed. 691, 57 S. Ct. 495 (1936).

The issue involved in the principal case was whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation placed an unconstitutional burden upon the Federal government, an issue reaching back into the past to *McCulloch v. Maryland,* 4 Wheat. 316, 432, 4 L. ed. 579, 607 (1819) and Chief Justice Marshall's hoary dictum that "the power to tax is the power to destroy." Upon the theory of tax immunity of either government, state or national, and its instrumentalities, from taxation by the other laid down in the *McCulloch Case* has rested the implied limitation on the taxing power of each not to unduly interfere with the governmental activity of the other through the use and exercise of that power. From this theory and from this decision has stemmed a formidable flow of authority in extension of the doctrine; the stream has broadened out so as to confer immunity on both state and federal employees from taxation on the salaries they derive from governmental instrumentalities. The stream swept downhill and forward and suddenly dried up.

As late as 1936 the United States Supreme Court had decided in *New York ex rel Rogers v. Graves* (*supra*) that the salary of the general counsel of the Panama Rail Road Co., a federal corporate instrumentality, was exempt from the New York state income tax; the court declaring that since the company was a federal instrumentality, it necessarily follows that fixed salaries and compensatior paid to its officers and employees in their capacity as such are just as much immune from state taxation as the instrumentality. Decided during the same year *Brush v. Commissioner of Internal Revenue* (*supra*) steadfastly clung to precedent with the United States Supreme Court holding that the salary of an engineer in charge of the maintenance of the public water system of New York State was immune from Federal income taxation because the water system was created and conducted in the exercise of an essential government function. That precedent once established is difficult of eradication is furnished by three state cases: *Martin v. Kenesson,* 274 Ky. 581, 119 S. W. (2d) 644 (1938) holding no income tax valid on salary of secretary-treasurer of the Production Credit Corp. of Louisville, a corporation created and authorized by Congress; *Geery v. Minnesota Tax Comm.,*

202 Minn. 366, 278 N. W. 544 (1938) which held income tax on salary of governor of Federal Reserve Bank of Minnesota invalid; and *Gordy v. Crimp,* 2 A. (2d) 692 (Md. 1938) which held that the salary of an assistant regional manager of the Home Owners' Loan Corp. was not subject to state income tax.

Historically, the application of the doctrine of *McCulloch v. Maryland* (*supra*) received its first manifestation on an income tax on the salary of an employee of a federal instrumentality in *Dobbin v. Erie County* (*supra*) where a tax of Pennsylvania, nominally laid upon the office of the captain of a federal cutter, but roughly measured by the salary paid to the officer, was held invalid on the ground that the tax on the emolument of office was the equivalent of a tax upon an activity of the national government and further that it was an infringement of the implied superior power to fix the compensation of federal employees without diminution by state taxation. This doctrine was re-affirmed in *Collector v. Day* (*supra*) where the salary of a state probate judge was held constitutionally immune from the Federal income tax on the grounds that the salary of an officer of a state is exempt from federal taxation, if the function he performs as an officer is exempt.

In the historical survey of the matter, the writer has gone backward in outlining the cases which have been overruled by the principal case; in evaluating the historical survey of the growth of the stream of discontent with early decisions, the writer will proceed forward in time. Justice Bradley in *McCulloch v. Maryland* (*supra*) did not accept the classical utterance of Chief Justice Marshall relating to the power of taxation. "I dissent," said he, "from the opinion in this case, because it seems to me that the general government has the same power of taxing the income of the officers of the State government as it has of taxing that of its own officers." But his was a voice wailing in the wilderness. A voice lost for more than a hundred years save in the dissenting opinions in *Jaybird Mining Co. v. Weir,* 271 U. S. 609, 615, 70 L. ed. 1112, 1115, 46 S. Ct. 592 (1925); *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218, 223, 72 L. ed. 857, 859, 48 S. Ct. 451 (1927); *Indian Motorcycle Co. v. United States,* 283 U. S. 570, 580, 75 L. ed. 1277, 1283, 51 S. Ct. 601 (1928); and *Brush v. Commissioner of Internal Revenue* (*supra*). But the first strong indication of a change in the torrent of the stream did not come until the decision in *Helvering v. Gerhardt,* 304 U. S. 412, 413, 416, 82 L. ed. 1432, 1433, 1434, 58 S. Ct. 969 (1937). It was pointed out in that case that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. The Court said, "And as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on employees by relieving them from contributing their share of the financial support of the other, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at a salary lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burden of the other." With this it held that the salaries of the employees of the New York Port Authority, a state instrumentality, created by New York and New Jersey, were not immune from federal income tax. This case, it is submitted, conclusively established the right of the federal government to tax salaries of state employees, a right previously extended in government contractor cases. A claim of an exemption from tax on the income of a contractor engaged in carrying out a government project was rejected in case of a contractor with a state in *Metcalf & Eddy v. Mitchell,* 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172 (1925), and of a contractor with the national government in *James v. Dravo Contracting Co.,* 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208 (1937). The stream was about to dry up.

In the principal case, the Court held that the imposition by a state of a nondiscriminatory income tax in respect of the salary of an employee of a corporate

instrumentality of the Federal government did not place an unconstitutional burden on the Federal government where Congress has not conferred on the salaries of the employees of such instrumentality an immunity from state taxation. It was said that the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burdens of the tax is in some way passed on so as to impose a burden on the national government tantamount to an intereference by one government with the other in the performance of its function. In this regard, it is well to remember that the possibility that a non-discriminatory tax upon the income of a state officer did not involve any substantial interference with the functioning of the state government was not discussed in the early cases holding *contra.*

Congress declared in the Home Owners' Loan Act of 1933 that the Home Owners' Loan Corp. was a corporate instrumentality of the government. Furthermore, Congress exempted from state taxation bonds of the corporation, as to principal and interest, except surtaxes, estate, inheritance and gift taxes; the corporation itself, including its franchise, its capital, reserves and surplus, and its loans and income; but it did not exempt its real property, nor did it expressly exempt salaries of its employees. On this point the Court said an intention on the part of Congress to confer on employees of a corporate instrumentality of government created by it immunity from state taxation of their salaries is not to be gathered by implication from the silence of the statute creating the instrumentality. Striking back at the decision in the *McCulloch Case,* the court further said that the theory that a tax on income is legally or economically a tax on its source is no longer tenable. Upon this point the stream would either dry out or sweep forward as a greater torrent than before; but here it stopped. It will be remembered that the power to create the agency includes the implied power to do whatever is needful or appropriate, and, if not expressly prohibited, there has been attributed to Congress some scope for granting or withholding immunity of federal agencies from state taxation. *Helvering v. Gerhardt (supra)*; *United States v. Bekins,* 304 U. S. 27, 52, 82 L. ed. 1137, 1144, 58 S. Ct. 811 (1937); *British-American Oil Producing Co. v. Board of Equalization,* 299 U. S. 159, 81 L. ed. 95, 57 S. Ct. 132 (1936). The silence of Congress implies immunity no more than does the silence of the Constitution. Then, if Congress had desired to grant immunity, it would have done so.

The Court held the present tax to be a non-discriminatory tax on income applied to salaries at a specified rate, and not in form or substance a tax upon the corporation; furthermore, the tax is not paid by the United States government or by the corporation, but is measured by the income which becomes the property of the taxpayer when received as compensation for his services and is paid from private funds. *New York ex rel. Cohn v. Graves,* 300 U. S. 308, 313, 314, 81 L. ed. 666, 670, 671, 57 S. Ct. 466 (1936); *Helvering v. Gerhardt (supra)*; *Fox Film Co. v. Doyal,* 286 U. S. 123, 76 L. ed. 1010, 52 S. Ct. 546 (1931); *Helvering v. Mountain Producers Corp.,* 303 U. S. 376, 82 L. ed. 907, 58 S. Ct. 623 (1931). Consequently, the court reached the decision that although assuming that the Home Owners' Loan Corp. is clothed with the same immunity from a state taxation as the government itself, it could not say that the present tax on the income of its employees lays an unconstitutional burden upon it.

The stream has ceased to flow. Only Justice Butler dissents and he hurls himself back more than a hundred years to the *McCulloch Case* and Chief Justice Marshall's "the power to tax is the power to destroy." Said Mr. Justice Butler, "Futile indeed are the vague intimations that this court may protect against excessive or destructive taxation. Where the power to tax exists, legislatures may exert it to destroy, to discourage, to protect or exclusively for the purpose of raising revenue." And herein is found perhaps the lone criticism of the principal case.